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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 712

JOYCE C. THORPE,

Petitioner,

—v.—

HOUSING AUTHORITY OF THE CITY OF DURHAM.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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HOUSING AUTHORITY OF THE CITY OF DURHAM.

REPLY BRIEF FOR PETITIONER

Introduction

On February 7, 1967, after petitioner's brief was filed in this Court, the Department of Housing and Urban Development issued a directive to all local housing authorities prescribing new procedures for the eviction of low income public housing tenants. The new federal requirement refutes the argument made by the respondent Housing Authority in this case that its action conforms with the federal administrative policy.[1] More importantly, the new federally prescribed procedures may afford a new and independent ground for reversal of the judgment of the North Carolina courts in petitioner's case. We discuss the new procedural requirements and their relationship to this case in part I, *infra.*

In part II, *infra,* we discuss the previous policy of the federal Public Housing Administration,[1a] relied upon by respondent to justify its actions in petitioner's case.

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[1] See "Brief for Housing Authority of the City of Durham," p. 11.

[1a] Now the Housing Assistance Administration of the Department of Housing and Urban Development.

I.

The Judgment Below May Also Be Reversed on the Basis of a New Federal Administrative Rule Adopted February 7, 1967.

The February 7, 1967, circular issued to all local housing authorities by Mr. Don Hummel, who is Assistant Secretary for Renewal and Housing Assistance of the Department of Housing and Urban Development (hereinafter referred to as HUD), is reproduced in the appendix to this brief, *infra*, pp. 4a-6a.

The circular first makes reference to pending lawsuits "challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction." It then states:

> Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

The directive then provides that, in addition to informing the tenant of the reason for any proposed eviction, each local authority shall maintain written records of every eviction which are to be available for review by HUD representatives, and should contain certain specified information. This circular superseded a prior circular dated May 31, 1966, which is reproduced in the appendix hereto, *infra*, p. 2a. The May 31, 1966, circular had stated that the Public Housing Administration "strongly urge[d], as a matter of good social policy, that Local Authorities in a private conference inform any tenants

who are given such notices of the reasons for . . . [eviction]."

The circular issued February 7, 1967, unlike the earlier circular, contains mandatory language. The authority of the federal agency to make such rules and regulations is conferred by the federal housing laws.[2] We believe that the new federal rule confers rights enforceable by individual low-income tenants, and submit that whatever may be the full scope of the individual rights conferred by the new rule, it must at least be available as a defense to a suit maintained in a state court by a local housing authority seeking to evict a tenant in violation of the rule.

It is plain, we think, that if the present rule had been in effect when the respondent sued to evict Mrs. Thorpe in September 1965, Mrs. Thorpe would have had a complete defense to the suit. Under the Supremacy Clause the state courts would have been bound to recognize her defense that the Durham Authority issued its notice cancelling her lease in violation of the governing federal procedural requirement.

We urge that this newly adopted procedural rule should now be applied to petitioner's case in accordance with the generally applicable principle that modal or procedural changes will be applied to pending litigation. This general tendency to apply new procedural regulations to pending cases is very strongly developed in the law. The policy is to apply the law as it exists at the time a court is called upon to decide pending litigation. It is exemplified by such cases as *Bruner* v. *United States*, 343 U.S.

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[2] See 42 U.S.C. § 1408. See also, 42 U.S.C. § 1404a. The authority of the federal agency to require records to be maintained is conferred by 42 U.S.C. § 1434.

112 (suit by employee against United States; pending certiorari in Supreme Court on question of jurisdiction of district court Congress amended statute making it clear that there was no such jurisdiction; the new statutory rule was applied to the pending case); *Ex parte Collett*, 337 U.S. 55 (new code provision applying *forum non conveniens* to FELA cases applied to pending case); *Orr* v. *United States*, 174 F.2d 577 (2nd Cir. 1949) (change in venue provisions applied in pending case); *Schoen* v. *Mountain Producers Corporation*, 170 F.2d 707 (3rd Cir. 1948) (change in rule of *forum non conveniens* applied in pending case); *Bowles* v. *Strickland*, 151 F.2d 419 (5th Cir. 1945) (procedural rule change relating to filing of suit under Emergency Price Control Act applied in pending case); *Hoadley* v. *San Francisco*, 94 U.S. 4 (change in removal statute applicable to case pending in state court); and *Congress of Racial Equality* v. *Clinton*, 346 F.2d 911 (5th Cir. 1964), and *Rachel* v. *Georgia*, 342 F.2d 336 (5th Cir. 1965) (change in statute to allow appeal of remand order in civil rights removal case applied to pending cases).

Of course, *Hamm* v. *Rock Hill*, 379 U.S. 306, illustrates the application of the rule applying a new statute to decide substantive rights in a pending case. See also, *United States* v. *Schooner Peggy*, 1 Cranch. 103; *United States* v. *Chambers*, 291 U.S. 217; *Massey* v. *United States*, 291 U.S. 608. The effectuation of the purpose of the new statutory regulation, as perceived by this Court, was strongly influential in these cases. And, similarly, in deciding whether or not to apply new judicial decisions to pending cases—or even retrospectively to cases which have become final—the Court has looked to the purpose of the rule involved.[3]

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[3] See, for example, *Linkletter* v. *Walker*, 381 U.S. 618, holding that the rule of *Mapp* v. *Ohio*, 367 U.S. 643, would be applied only prospec-

Application of the new HUD rule of February 7, 1967, in this case is justified by a variety of considerations, including the language of the circular, its purpose, and the general tendency of this Court's decisions, just discussed, to apply procedural innovations to pending cases.

First, we believe that analysis of the language of the circular supports its application to petitioner's case. The first paragraph of the circular (appendix, *infra*, p. 4a) which refers to the dissatisfaction caused by the prior practices and the litigation filed throughout the United States challenging those practices, reflects a concern for doing justice for the individuals who have focused attention on the practice. The second paragraph (*ibid.*) prescribing an "essential" requirement that a tenant be told the reasons for the eviction and "given an opportunity to make such reply or explanation as he may wish" is timeless. The paragraph contains no language of futurity. In contrast, the third paragraph (*ibid.*), establishing a record-keeping requirement, does expressly refer to the future and applies "from this date," i.e., February 7, 1967. The final paragraph, which says that the earlier circular (strongly urging that tenants be told reasons for eviction) is now superseded, is also suggestive of a displacement of policy in a manner consistent with retroactivity.

Second, just as was true with respect to the federal policy in *Hamm* v. *Rock Hill*, 379 U.S. 306, it is fair and

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tively because the purpose of the rule was to deter unlawful conduct, and this purpose would not be served by retrospective application of the exclusionary rule. Of course, the *Mapp* decision was applied to cases pending on appeal at the time of *Mapp*. *Johnson* v. *New Jersey*, 384 U.S. 719, 732. See also, *O'Connor* v. *Ohio*, 385 U.S. 92, which applies the Fifth Amendment principle of *Griffin* v. *California*, 380 U.S. 609, to a pending case. And see the decisions giving retrospective effect to the right to counsel as declared in *Gideon* v. *Wainwright*, 372 U.S. 335, e.g., *Doughty* v. *Maxwell*, 376 U.S. 202; *United States* v. *LaVallee*, 330 F.2d 303 (2nd Cir. 1964).

just to apply the new and more enlightened policy so that it will benefit those whose protests prompted the new rule.

Third, this case involves a procedural regulation in the classic sense; it relates to notice and the right to be heard. The new rule requires procedural safeguards prior to the initiation of an action to evict, but does not deprive the local housing authority of its right to maintain eviction proceedings after compliance with the prescribed procedures. The requirement would not be duplicated or wasteful since the respondent authority has never given petitioner the benefit of such procedures.

There remains, of course, the question of whether the new federal administrative rule conforms to the requirements of the Constitution and does actually provide procedures sufficient to protect petitioner's rights under the Due Process Clause. We have argued in our Brief that petitioner was entitled to notice of the reason her low income housing benefits were cancelled and also was entitled to an administrative hearing in order to contest the factual basis for the local authority's action. The HUD circular of February 7, 1967, is not explicit with respect to several important matters affecting the constitutional claim. We urge that the Court construe the HUD rule to require at least the minimum safeguards necessary to afford basic fairness.

The HUD circular states that tenants must be told "the reasons for the eviction" and that the records shall contain a statement of "Specific reason(s) for notice to vacate." It indicates that "if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted." We urge that the Court construe these provisions to mean that tenants must be ad-

vised of the facts on the basis of which the agency proposes to take action, including a statement of the information on the basis of which the agency believes the facts asserted to be true.

The HUD circular does not use the word "hearing" but, rather, refers to notice being given "in a private conference or other appropriate manner" and states that the tenant should be "given an opportunity to make such reply or explanation as he may wish." HUD also requires that a record be kept including, *inter alia,* a "summary of any conferences with tenant[s], including names of conference participants." We urge that these provisions be interpreted to include the right to be heard in person or by counsel at such a hearing or "conference," and also to include fair opportunities to challenge the grounds of the local authority's proposed action, to probe the facts relied upon by the authority, and to present the tenant's own version of the facts. The provision should also be interpreted to include a requirement that the agency decision be rendered on the basis of the facts presented to it.

It should be stated that petitioner does not contend that due process necessarily requires in all cases any particular set of judicial-type hearing rules or common law evidentiary principles. We contend only for such procedures as may reasonably be necessary to give a complete and fair airing of the controverted facts. The detailed requirements will, of course, depend upon the circumstances of the particular case.[4]

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[4] Note, for example, the minimum requirements adopted by the Court of Appeals for the Fifth Circuit in a state college expulsion case. *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150, 158-159 (5th Cir. 1961), cert. denied 368 U.S. 930. Cf. the procedures for parole revocation set forth in *Hyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963), cert. denied, 375 U.S. 957. Cf. also, *Gonzalez* v. *Freeman,* 334 F.2d 570, 578 (D.C. Cir. 1964), involving the basic standards necessary to insure fairness prior to debarment from participating in government contracts.

If this Court agrees with petitioner's view that the new HUD regulation gives the sort of full and fair hearing which we have just described, there is, of course, an additional reason to apply the new procedure to petitioner's case. Such an application, affording petitioner the full measure of relief sought in the present case, would permit the Court to avoid unnecessary decision of constitutional questions. See *Ashwander* v. *T.V.A.*, 297 U.S. 288, 341 *et seq.*. (Mr. Justice Brandeis dissenting in part). Such a route to disposition of the case would justify reversal of the judgments below and a remand of the cause with directions to set aside the eviction, leaving the authority to take such further steps as may be conformable to law.

II.

The History of the Superseded Policy Relied on by Respondent Shows Its Potential and Purpose for Abuse.

The Brief of the Housing Authority of the City of Durham, p. 11, argues that: "In following the provisions of the lease and the published directives of the Federal Public Housing Administration the local Housing Authority did not act arbitrarily." In a footnote to the sentence just quoted, the Authority's Brief sets out a portion of a provision in an HUD publication known as the LOCAL HOUSING AUTHORITY MANAGEMENT HANDBOOK, PART IV, SECTION 1 —OCCUPANCY POLICIES (July 1965), p. 8. We quote the entire subparagraph:

> 6.d. It is recommended that each Local Authority's lease:
>
> (1) Be drawn on a month-to-month basis whenever possible. This should permit any necessary evictions to be accomplished with a mini-

mum of delay and expense upon the giving of a statutory Notice To Quit.[5]

(2) Contain no provision absolving the Local Authority from liability for its own negligence.

(3) If Local Authority policy provides for charges for utility consumption in excess of specified amounts, contain a provision obligating the tenant to pay amounts assessed by the Local Authority for overconsumption of utilities.

Of course, as we have shown in part I, *supra*, the federal administrative policies upon which respondent relies have now been superseded by new and more enlightened policies which, far from condoning a refusal to disclose the grounds of an eviction notice, compel disclosure and a fair opportunity to reply. But, in any event, the former federal policy invoked by respondent, and which was in effect at the time of the notice to vacate in this case, displays in its language, and its history, the clearest example of potential and purpose for abuse, and gives compelling force to petitioner's constitutional claims.

The recommendation was first made to local housing authorities in a Public Housing Administration circular dated July 28, 1954, which is reproduced in the appendix, *infra*, p. 1a. The circular states that it was issued in response to the ruling of the Municipal Court of Appeals for the District of Columbia in *Rudder* v. *United States*, 105 A.2d 741 (D.C. Mun. App. 1954), subsequently reversed 226 F.2d 51 (D.C. Cir. 1955). *Rudder* involved a constitu-

[5] Note the difference between the wording of 6.d(1) above and the language quoted in the Authority's brief which contains the words "without stating reasons for such notice" at the end of the second sentence. It may be that the Authority's brief quotes an earlier edition of the Handbook.

tional challenge to the so-called Gwinn Amendment, temporary legislation which formerly barred subversives from occupying public housing units.[6] The Municipal Court of Appeals held in *Rudder* that since the local agency invoked the Gwinn Amendment provision in its lease to evict the tenants, the tenants could defend the eviction on the ground that the eviction was unlawful by attacking the constitutionality of the Gwinn Amendment. The court sustained the eviction by holding the Gwinn Amendment valid. The July 28, 1954, circular (appendix, *infra*, p. 1a) was issued in response to this decision and before the District of Columbia Circuit reversed the eviction order. The circular summarized the *Rudder* litigation and said that the agency could have terminated the monthly tenancy by serving a statutory notice to evict without revealing its reasons, but had erred by assigning a specific reason that could be challenged as unconstitutional. The circular concluded:

> In light of this decision it is suggested that all existing tenant lease forms be reviewed to determine whether there are contained therein any provisions which might be interpreted by a Court as being contrary to a simple monthly tenancy, thus precluding tenancy being terminated by merely giving the statutory Notice to Quit. It is also suggested that all future Notices to Quit cite only the provision of the lease which permits termination within a specified time without reference to any other provision.

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[6] The Gwinn Amendment was former section 1411(c) of Title 42 of the U. S. Code. The provisions were contained in three appropriations acts. See Act, Aug. 31, 1951, c. 376, Title I, § 101, 65 Stat. 277; Act July 5, 1952, c. 578, Title I, § 101, 66 Stat. 403; Act July 31, 1953, c. 302, Title I, § 101, 67 Stat. 307. The Attorney General ruled that the Gwinn Amendment was temporary legislation which has expired. 41 Ops. Att'y. Gen., April 26. Note, however, that the lease in the instant case still contains an anti-subversive provision (R. 17).

Thus the Federal Government originally urged the local housing authorities to terminate without giving reasons for the specific purpose of enabling them to evict people for reasons that might be challenged as without factual basis or as violative of federal constitutional rights—in the *Rudder* case, rights protected by the First Amendment —by evicting only under a provision that did not require giving a reason for the action. Thus the government in 1954 encouraged precisely the kind of misuse of a termination provision that petitioner challenges here; that is, the housing authority concealing a possibly unconstitutional motive behind an eviction for which no reason need be given.

Respectfully submitted,

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PUBLIC HOUSING ADMINISTRATION

HOUSING AND HOME FINANCE AGENCY — WASHINGTON 25, D. C.

CIRCULAR
7-28-54

TO: Local Authorities
Field Office Directors

SUBJECT: Decision in Rudder v. US of A and Its Importance Re Tenant Lease Forms

The decision made in the case of John Rudder and Doris Rudder, Appellants, v. United States of America, Appellee, No. 1129 in the Municipal Court of Appeals for the District of Columbia, on June 9, 1954, is one which should be of interest to all Local Authorities as it affects the issuance of Notices To Vacate and the right to evict any tenant, either in the Lanham Act or the low-rent program.

The questions at issue were whether the U.S. Government (National Capital Housing Authority) is required to reveal its reason for seeking to terminate tenancy and whether, if a reason were given, the tenant had the right to defend on the ground that the reason given was improper or unlawful. The Appellate Court stated that the Government, like any private landlord, has the right to terminate a monthly tenancy by serving a statutory Notice To Quit without revealing the reason therefor, providing, that such action is in accord with the existing lease agreement with the tenant. Although, in this case, the lease agreement did provide for termination upon 30 days' notice, the Housing Authority included in the lease a provision that it could be terminated for any one of eight listed reasons. The Appellate Court held that the Government in citing one such reason in its Notice To Quit was in effect saying that eviction would be sought only for one or more of these eight stated reasons. It therefore held that the Trial Court should have entertained the defense of the tenant. However, because of another more compelling consideration the Appellate Court did not reverse the decision of the Trial Court.

In light of this decision it is suggested that all existing tenant lease forms be reviewed to determine whether there are contained therein any provisions which might be interpreted by a Court as being contrary to a simple monthly tenancy, thus precluding tenancy being terminated by merely giving the statutory Notice To Quit. It is also suggested that all future Notices To Quit cite only the provision of the lease which permits termination within a specified time without reference to any other provision.

John D. Carmichael
Acting Commissioner

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PUBLIC HOUSING ADMINISTRATION

WASHINGTON D.C. 20413

CIRCULAR
5-31-66

TO: Local Authorities
Regional Directors
Central Office Division and Branch Heads

FROM: Commissioner

SUBJECT: Terminations of tenancy in low-rent projects

The Public Housing Administration has for a number of years recommended that tenant leases be drawn on a month-to-month basis noting that this practice should permit any necessary evictions to be accomplished upon the giving of a notice to vacate. There is as you may be aware growing opposition and challenge from individuals and organizations to the practice of simply giving the statutory notice without stating the reason or reasons therefor.

In connection with the above practice, we strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given such notices of the reasons for this action.

Also, not all Local Authorities have kept their tenant lease forms current with the result that, in some cases, obsolete and unenforceable lease conditions are being challenged legally. We urge that all Local Authorities review their lease forms and remove any such conditions. Regional Offices will provide advice and assistance in connection with such reviews as may be desired.

Marie C. McGuire
Commissioner

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, D.C. 20410

OFFICE OF THE ASSISTANT SECRETARY
FOR RENEWAL AND HOUSING ASSISTANCE

CIRCULAR
2-7-67

TO: Local Housing Authorities
Assistant Regional Administrators for Housing Assistance
HAA Division and Branch Heads

FROM: Don Hummel

SUBJECT: Terminations of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish.

In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.

2. Date of notice to vacate.

3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.

(Cont'd)

(See Opposite)

4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.

5. Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

Assistant Secretary for Renewal
and Housing Assistance